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The following analysis of SB 15, "The California Water Transfer Act," has been prepared with a focus on specific sections of the proposed legislation that in my opinion raise particular questions and concerns for R-WIN* and CAFF. The bill contains a number of provisions on issues such as water rights that, while of undoubted relevance to many of our members, do not relate to the central issue of impacts of water transfers on rural communities and economies, and so are not addressed in this analysis.

All references to SB 15 are to the June 18, 1996 preprint version of the bill.

I. Introduction and General Observations

SB 15 is for all intents and purposes the legislative manifestation of the Model Water Transfer Act For California, drafted by Prof. Brian Gray of the University of California, Hastings College of the Law, under the sponsorship of the California Business Roundtable, the California Chamber of Commerce, the California Farm Bureau Federation, and the California Manufacturers Association. The differences between the Model Water Transfer Act and SB 15 are minor and consist primarily of legislative boilerplate and shifts in the division and numbering of sections. While Sen. Jim Costa is identified as the author of SB 15, Prof. Gray is the true author of the bill. Therefore, commentaries on the Model Water Transfer Act by the Natural Heritage Institute, the South Delta Water Agency, and others still apply to SB 15.

SB 15 seeks to create a mechanism by which water transfers can be expanded and expedited in order to more "efficiently" allocate the state's water resources. This mechanism is meant to be a key element in the ongoing reconfiguration of California's water policy currently occurring in both the CalFed and CVPIA processes. However, it is not at all clear from the language of the bill how this proposed transfer mechanism is meant to fit into those processes. As will be seen in the analysis of particular sections below, elements of SB 15 appear to be either duplicating or conflicting with proposals arising from the CVPIA process.

A larger question, and one made particularly germane by SB 15's attempt to exempt aspects of water transfers from the California Environmental Quality Act (CEQA), is how, or if, a state transfer mechanism will operate when a proposed water transfer involves water allocated or controlled under a federal program. This

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situation could arise with water allocated under the CVP or water that falls under the "Fed" part of CalFed. As R-WIN has maintained previously in comments on CVPIA, transfers of federally-administered water are federal projects affecting the human environment and are therefore subject to the National Environmental Protection Act (NEPA). The state has no power to exempt such projects from NEPA. NEPA is particularly significant to CAFF because it extends to projects affecting the human environment, a term legally recognized to include cultural, economic, and social impacts as well as purely physical ones.

As was, and still is, the case with Sen. Costa's SB 900, now passed by the electorate as Prop. 204, SB 15 runs the risk of locking the state into specific mechanisms before adequate public review has occurred or clear overarching policy frameworks have been established. The potential problems of coordination with federal projects and policies referred to above are only one aspect of this issue. As both the debate on SB 15 and the CVPIA and CalFed negotiations continue, it is imperative that the bill's sponsors clarify how its provisions will fit into the larger picture of California water policy.

II. Section-by-Section Analysis

As was stated previously, this analysis is focused on those sections of SB 15 most relevant to R-WIN's particular concerns. Unless otherwise indicated, all section numbers refer to the June 18, 1996 preprint version of the bill.

79750(b). This subsection makes the unsupported claims that water transfers serve the state constitutionally-mandated public interest, and that transfers serve this interest by "allowing market forces to direct the distribution of developed water supplies." R-WIN takes issue with this assumption that the mythical beast known as "the market" necessarily serves the public interest. Without rigorous regulation, market forces would create a situation where the state's water became nothing more than a commodity to be bought up by the highest bidder, most likely urban and suburban developers, resulting in explosive urban and suburban sprawl and the destruction of California's rural economy, which in turn would lead to the dislocation and further impoverishment of already poor communities. It is hard to imagine how anyone could see such a result as in the public interest. R-WIN does not buy into the widespread delusion that "economic efficiency" is by itself a moral good, and does not accept that transforming water from the state's commonwealth to a market commodity serves either the spirit or the letter of Art. X, Sec. 2 of the state constitution. We find the language of this subsection to be pernicious and unsupported by facts or logic.

79750(d). The language of this subsection should be modified to state that third-party impacts (TPIs) are to be evaluated and avoided or mitigated to a point of insignificance before any water

transfer is approved. While this subsection refers to TPI protection as well as compensation, the bill's focus is entirely on compensation after the fact. This is exactly backwards from where the emphasis should be. Compensation should be seen as a mechanism of last resort to be employed only when avoidance or mitigation have been exhausted as alternatives.

79750(f). This subsection needs to be expanded to refer to the relationship between water transfer laws and NEPA, CVPIA, and CalFed, as discussed above. Comment on SB 15's means of "clarifying" its relationship with CEQA is reserved for following sections dealing specifically with the issue.

79756.5(c)(2). The specifics of this subsection create a potentially dangerous loophole in the bill's provisions governing long-term water transfers. In order for successive short-term transfers to fall under those relatively more restrictive provisions, both the transferor and transferee must be the same person, or agents, etc. of the same person. Consequently, if a transferor entered into a short-term agreement transferring water from a certain point of diversion, and then, immediately upon the conclusion of that agreement, entered into another one for the same amount from the same point of diversion but with a different transferee, the second transfer would also be considered "short-term," even though its impacts would be long-term. This is unacceptable. The language of this subsection should be revised so that successive short-term transfers by the same transferor affecting the same point of diversion are defined as long-term transfers, regardless of the identity of the transferee.

79758(c). More detail is needed as to the nature and extent of the "consultations" with interested parties regarding the adoption of the regulations concerning Delta water quality standards. Also, the list of experts to whom these regulations are to be submitted for review should specifically include representatives of agricultural and rural community disciplines.

79761. The exemption of any aspect of water transfers from CEQA oversight is shortsighted and unacceptable. CEQA analysis is the primary means by which potentially significant environmental impacts can be identified and avoided or mitigated to a point of insignificance before a project is approved. Identifying and addressing such impacts at the soonest possible stage results in the least amount of cost and disruption once the project is underway. Jettisoning this efficient and effective review procedure for the sake of expediting transfers will in fact lead to higher costs and regulatory burdens when, as is inevitable, unreviewed transfers result in significant negative impacts.

Instead of exempting certain transfers from CEQA altogether, the authors of SB 15 should explore the creation of a CEQA tiering structure, in which programmatic CEQA review is done on a large-scale regional, basin, or district level. This programmatic EIR

would create guidelines and allow for avoidance and mitigation of impacts to be pursued in an integrated manner. Individual projects would then be required to address only those particular impacts not already covered by the programmatic document, thereby substantially lessening the regulatory burden while still providing the essential degree of review and protection CEQA affords.

79761(a). Exempting short-term transfers from CEQA is unacceptable. Substantial negative environmental impacts can occur within two years when a significant amount of water is removed from agricultural land, as was seen during the most recent drought and the administration of the state water bank. This proposed exemption is particularly troublesome when taken in combination with the loophole allowing successive short-term transfers currently found in Sec. 79756.5(b)(2), as discussed above.

79761(b)(1-2). It is unclear exactly what the distinction is between a "decision" on a long-term transfer as referred to in sub-subsection (1) and "consideration or negotiation" in sub-subsection (2). Exempting any part of the decision-making process on a long-term water transfer, where the consequences can be both severe and enduring, even permanent, seems to be a very bad idea.

CHAPTER 4. GENERAL STANDARDS AND PROCEDURES. In general, all of the review, comment, and appeal periods set forth in this chapter are too short for anything more than token participation by affected parties. This problem is compounded by the exemptions from CEQA review noted above, as well as by the absence of any required TPI evaluation by the petitioner for the water transfer.

79772(c)(1). The notice provision set forth in this subsection is insufficient to adequately notify potentially affected parties. The absence of adequate environmental and third-party impact review means that potentially affected parties will be inadequately identified, or missed entirely. It must be incumbent upon the petitioner to adequately identify and notify all reasonably identifiable potentially impacted parties. This notice must be given via direct contact when possible, and through public meetings (Boards of Supervisors, etc.) and community organizations as well as newspapers of general circulation.

79774. Giving water users and other interested parties only 30 days to prepare and present written protests of proposed water transfers is unreasonable. The nature and extent of potential impacts can be complex, and affected parties, particularly rural communities, are unlikely to have the data necessary to document such impacts at hand. The absence of adequate environmental and TPI evaluation from the petitioner unfairly places the burden for obtaining and organizing all the information on potential impacts on those least likely to have access to it. The petitioner should be the one who first puts data on impacts on the table, and those affected by those impacts should then have adequate time (90 days) to prepare written comments and objections to such data.

79775(a). This subsection, when seen in combination with 79772(c), 79773, and 79774, creates an absurd situation. The board is required to begin its investigation of a petition no later than 10 days after receiving it. This is identical to the time requirement for public notice. What is particularly disturbing is the fact that the 30-day post-notice protest period corresponds exactly to the 30-day investigation period for short-term transfers. The language of 79775(a) clearly states that the board is not required to use all 30 days to reach a proposed determination. Thus, it is entirely possible that a proposed determination on a short-term transfer could be made before a potentially affected party was able to present its written protest. This makes a mockery of any concept of procedural due process. The evaluation process should not even begin before all written protests have been received and reviewed.

79775(b). 90 days is not enough time for an adequate evaluation of the potential impacts of a long-term water transfer, particularly if CEQA analysis is involved. Once again, this constitutes no more than a token gesture in the direction of procedural due process. And it is unclear what part of the long-term transfer decision-making process is addressed here. Is this the "decision" concerning a long-term transfer referred to in 79761(b), to which CEQA applies, or is this "consideration or negotiation" of such a transfer as referred to in 79761(c), to which CEQA does not apply? If the former, then 90 days is laughably insufficient to allow for proper CEQA analysis. If the latter, then when does CEQA apply?

79776. 20 days is inadequate to allow for the preparation of an adequately documented response to a proposed determination on a transfer, particularly a long-term transfer or one involving cumulative impacts. Once again, this problem is exacerbated by the lack of any petitioner-submitted environmental or TPI data upon which appellants could base their objections. This section is also troubling when seen in connection with 79775(a). Only parties that submitted written protests before the proposed determination was made are entitled to appeal it after it is presented. This restriction is reasonable only if the notice provisions in 79772(c) are greatly expanded and the pre-determination written protest period is extended and allowed to run its entire course before any board evaluation commences.

79777(a). The 30-day time period between the completion of a proposed determination and a hearing on responses to that determination needs to be extended in light of the issues raised in 79776 above.

79778(a). There is no adequate reason for denying a hearing to parties who have presented written protests to a proposed determination. As was stated previously, there is no basis for assuming that short-term transfers necessarily do no not result in serious impacts. Any decision on the appropriateness of a hearing must be based on procedural due process considerations. Short-term

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water transfers can result in the loss of livelihood and other property interests under the 14th Amendment; therefore, any party that can document the likelihood of such a loss is entitled to a hearing.

79778(b). Assuming that at this point, if no other, CEQA does apply to the decision-making process, 30 days is totally inadequate to allow for the level and degree of evaluation necessary to make an informed decision on a long-term water transfer.

79781(b). This subsection raises three major concerns. First, the decision-making criteria in 79781(b) effectively subverts the underlying principle of environmental protection in California. CEQA calls for the evaluation and analysis of potential impacts by the project proponent, and then requires avoidance or mitigation to the point of insignificance of any factors that <u>may</u> lead to substantial negative impacts. This places the emphasis where it belongs: before the project commences. In place of this reasonable and cost-efficient approach, this subsection requires the board to approve a short-term transfer unless it <u>would</u> lead to injury to legal water users or substantial environmental impacts. In other words, if there is anything less than 100% certainty that negative impacts would result from a short-term transfer, it must be approved. This is completely unacceptable.

The second, related problem has to do with the procedural provisions of 79781(b)(2). The petitioner has the burden of making a prima facie case that the proposed transfer meets the requirements of the subsection. This is effectively no burden at all, since evidence of <u>any</u> possibility, no matter how slight, of a project not causing negative impacts would be enough to satisfy those "requirements." The burden then shifts to anyone protesting the transfer. Conversely, this burden is almost impossible to bear successfully, particularly without environmental and TPI data provided by the petitioner under CEQA and related statutes. Not only are the time periods for protests of short-term transfers wholly inadequate, as noted above, but the legal hurdles are also practically insurmountable.

The third and final problem with this subsection is the total absence of any consideration of TPIs or other socioeconomic impacts. As has been noted before, short-term transfers can have serious consequences for rural communities, particularly when they add to cumulative impacts from previous transfers. TPIs must be included in any list of factors to be considered before any transfer is approved.

79781(d)(2). The standard of acceptable mitigation applied by the board should be established as "avoidance or mitigation to a level of insignificance." Any proposed mitigation by a petitioner must be shown by the petitioner to be either in place or fully prepared to be put in place, adequately funded, independently monitored for ongoing execution, and approved by the affected community.

79781(d)(4). This subsection excessively restricts the sort of long-term transfers to which TPI analysis would apply. Long-term transfers of water made available from sources other than fallowing or land retirement can lead to serious impacts. If such impacts are determined to be likely, then they should be considered in any decision-making process. The determining factor for TPI analysis should be whether there is a likelihood of such an impact, not what the source of the water might be.

Also, there are several larger counties in the state in which agriculture and urban development co-exist (Los Angeles, Kern, Ventura, Fresno, Monterey, Sacramento, etc.), and in which long-term water transfers could lead to significant negative impacts. As it stands, this subsection apparently would allow long-term transfers of water obtained by fallowing or land retirement without the required TPI analysis as long as it occurred within a county, no matter how big the county or how far the water was moved from its prior point of use. The language and punctuation of 79781(d)(4)(B) are very unclear.

79781(g). In general, this subsection is based on the false assumption that the community and economic effects of a single water transfer can be neatly isolated and determined without any reference to other factors, and that only such discrete effects can be the basis for denying a petition for a long-term water transfer. In reality, impacts cannot be segregated so easily. A transfer which, taken by itself, might lead to minor impacts at worst can be catastrophic if it is the last in a chain of transfers, droughts, groundwater pumpings, or other depletions of a community's water supply. The issue of cumulative impacts is one that must be addressed. As was the case with the land retirement and fallowing restrictions in 79781(d)(4), the decision whether to approve a transfer must be based on its overall impact, not on the particulars of an individual transfer. Insofar as the costs and obligations of mitigation or avoidance of cumulative impacts can be allocated equitably to multiple causes of those impacts, then such a policy should by all means be pursued. However, an inability to so distribute the burden should not be allowed to serve as an excuse for approving a transfer that, when added to other burdens on the water supply, creates serious hardships for entire communities or regions.

79781(g)(2). Several of the "factors other than the proposed water transfer" listed here are particularly troublesome. "Changes in the operation of water facilities not controlled by the petitioner," "changes in river flows," "changes in the general economic conditions of the region," and "other hydrologic and economic conditions" could all be the result of other water transfers, particularly successive short-term water transfers or multiple simultaneous short-term transfers by different parties. In the current version of the bill, such transfers would be exempt from all but the most cursory of reviews. This makes it entirely too easy to desiccate an entire community or region with no

significant TPI review at any stage of the process.

79786(b). Two of the definitions of "conserved water" put forth in this subsection are troublesome. "Increased efficiency" is too general a concept and could potentially be used as a rationale by an upstream user to transfer "conserved" water that would normally be a return flow depended upon by a downstream user. "Land fallowing or retirement" is unacceptable as a means of water conservation without, at the very least, thorough environmental and TPI analysis, avoidance or mitigation to a level of insignificance of TPIs before the fact of transfer, and a solid, well-financed program of compensation/mitigation after the fact of transfer (such as that currently proposed by R-WIN/CAFF). Fallowing and land retirement lead to the most immediate and extreme TPIs. Given the potential extent of negative effects they could set in motion and the consequent need for careful and thorough analysis, fallowing and land retirement have no place in a system of <u>expedited</u> water transfers.

79786.5(a). This subsection is seriously flawed. By withdrawing only long-term transfers of water made available by fallowing or land retirement from expedited review, a large loophole is created for the use of fallowing/retirement water for successive expedited short-term transfers to different transferees (see discussion of 79756.5 above). The impacts on a rural community from land taken out of production for two years (a "short-term" transfer) can be profound and irreversible. Transfers of <u>any</u> duration involving fallowing or land retirement should be disfavored, and certainly not expedited. Also, as noted in the discussion of 79781(d)(4) above, whether or not water is transferred out of a county is not a valid criterion for determining impacts. Any regional distinctions should be made on the basis of hydrologic basins or other criteria more directly connected to the actual location and use of the water, and should be secondary to consideration of the extent of the impact of the transfer.

79789. Any proposal for an expedited transfer of "conserved" water must include analysis of any potential TPIs and means by which those TPIs can be avoided or mitigated to a level of insignificance. At present there is <u>no</u> provision for mitigation or avoidance before the fact.

79790. The unstated but implied 30-day comment period is wholly inadequate.

79791. Apparently the only criterion for approval of an expedited transfer is whether the transferor's calculation of the quantity of water truly "conserved" is accurate. This is an unacceptable abdication of responsibility. To say that a water transfer, particularly a long-term water transfer, can be approved without <u>any</u> environmental, economic, or cumulative impact review as long as the water to be transferred is "conserved" (including water made available by fallowing or land retirement or by the deprivation of

downstream users) is to make a mockery of procedural due process. To think that the potential impacts of such giveaways can somehow be cured by a $5/acre-foot fee (see below) is naive at best.

79793. Exempting the decision of the board in an expedited water transfer from judicial review adds insult to injury. Not only is there no opportunity for review of potential impacts in the determination process, but there is no opportunity to appeal that decision. Affected parties are completely frozen out of the process except for an inadequate 30-day comment period, and are expected to accept $5/acre-foot in compensation. This is the greatest single due process travesty in a bill that contains more than a few of them.

79795. While the idea of a fee paid by beneficiaries of water transfers is one CAFF supports wholeheartedly, that fee must be both adequate to do what it claims to do - compensate third parties - and only used as a last resort when other, more effective means of avoidance or mitigation of TPIs have been exhausted. This fee proposal satisfies neither of those requirements. $5/acre-foot is completely inadequate, particularly when it is meant to compensate not only economic and community impacts, but environmental and agricultural impacts as well. Likewise, it stands alone as the only means of addressing TPIs. As has been noted above, there is no provision or requirement for avoidance or mitigation to a level of insignificance before the fact anywhere in the expedited transfer process. The clear intent of this section of the bill is to allow expedited water transfers with no thought for what the consequences may be, and then leave the victims to fight it out over the inadequate funds allotted to clean up the mess. In order for this provision to have any merit at all, it must increase the amount of the fee significantly and be joined as the final, last-resort element to a comprehensive plan of identifying and avoiding or mitigating to insignificance TPIs at the earliest possible point in the approval process.

CAFF recommends that 79795 and the remainder of Chapter Five be deleted and replaced by CAFF's "Proposal for Assessing and Mitigating Third Party Economic Impacts From Water Transfers and Reallocation in California's Agricultural Regions."

79796(b). The list of possible claimants should be expanded to include chambers of commerce, community organizations, farm labor organizations, and other non-governmental entities representing individual members of communities sustaining negative impacts as a result of water transfers.

79798(a). Without CEQA or TPI analysis by the transferor as a basis for a claimant's case, it is unreasonable and unjust to place the burden on the claimant, who is least able to provide the documentation necessary to make a case. At the very least, the claimant should be required to make no more than a prima facie case

for the existence of negative impacts, at which point the burden should shift to the transferor.

79798(b). As was the case with 79781(g), above, this enumeration of "other factors" which cannot be used as part of a claimant's case completely ignores the very real issue of cumulative impacts, particularly cumulative transfers.

79800. The limitation of any compensatory award to the amount paid by the transferee has some problems. First, the amount of money this represents will often be inadequate, particularly when there are multiple claimants. Second, this makes no allowance for the existence of cumulative impacts, which could be more equitably compensated by moneys derived from a common fund. To attempt to deal with the first of these problems by apportioning what will be, at $5/acre-foot, already meager funds among multiple claimants is a hollow gesture. The fee must be raised to a level where adequate compensation can be had by all injured parties while still allowing the transferee the benefit of the bargain. The second of these problems could be dealt with, at least in part, by the creation of a common fund into which all transferees paid, as detailed in the CAFF Proposal referred to above.

79802. Precluding judicial review is excessively restrictive of due process. Courts should be allowed to review arbitration decisions under the "arbitrary and capricious" standard of review, in which substantial deference is paid to the decisions of the board and arbitrator, but arbitrary, capricious decisions can be overturned.

79806. The return of the fees to the transferees seems to be excessively generous in light of the economic benefits presumably enjoyed by the transferees at the expense of the affected communities. Given the interrelatedness of California's water system and the very real possibility of cumulative impacts down the road for which the transferee has some responsibility, it makes more sense to place the fees in a common fund in which any surplus from a particular transfer could be applied to other transfers where the fees are inadequate or cumulative impacts drive up compensation costs. Even if the fees are to be returned, the 180 day period in 79806(b)(1) is far too short. Impacts could easily arise after 180 days, particularly in agricultural regions where the economy is seasonal. The fees for short-term transfers should be held at least for the duration of the transfer.

CHAPTERS 10 AND 11 - STATE WATER BANK AND STATE WATER RESOURCES CONTROL BOARD. In general, these chapters seem to be either duplicating or in conflict with proposals for a State Water Transfer Clearinghouse currently under discussion in the negotiations on CVPIA. It is imperative that all water transfer oversight be concentrated in one body. The CVPIA proposal envisions the Clearinghouse administered by the California Resources Agency. This bill creates a registry under the aegis of

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SWRCB. As SWRCB is not under the Resources Agency umbrella, this creates a potential turf war between two state agencies - something to be avoided at all costs. The water bank is proposed to be administered by the Department of Water Resources, which is under the Resources aegis but with its own agenda. This is a recipe for gridlock, confusion, and exasperation, and runs directly counter to the admirable principle behind these proposals, which is the centralization of information. There must be coordination between any state water transfer legislation and the CVPIA/CalFed processes. Failure to do so will result in a congeries of agencies with overlapping or conflicting mandates.